

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
APPENDIX**



75-1350

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,  
Appellee,

X

-against-

:

Docket No.  
75-1350

PETER EVANS,

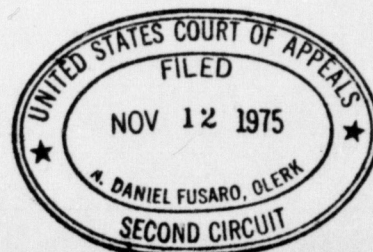
:

Defendant-Appellant. X

APPENDIX FOR APPELLANT

LAWRENCE STERN  
OF COUNSEL

IRVING COHEN  
Attorney for Appellant  
299 Broadway  
New York, N.Y. 10007  
(212) 233-3330



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INDICTMENT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

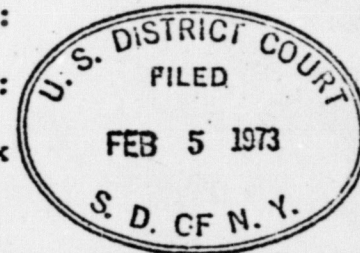
PETER EVANS, DEBORAH ANN McKINNEY  
and THOMAS EVANS,

73 CRIM. 135

: INDICTMENT

: 73 Cr.

Defendants .



The Grand Jury charges:

1. From on or about the 1st day of September, 1972 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, PETER EVANS, DEBORAH ANN McKINNEY and THOMAS EVANS,

the defendants and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendant unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about September 12, 1972, PETER EVANS and DEBORAH ANN McKINNEY entered apartment 22 at 17 St. Marks Place and met with THOMAS EVANS.

2. On or about September 22, 1972 DEBORAH ANN McKINNEY entered an automobile at First Avenue and 5th Street.

(Title 21, United States Code, Section 846.)

SECOND COUNT

The Grand Jury charges:

On or about the 22nd day of September, 1972,  
in the Southern District of New York, PETER EVANS,  
DEBORAH ANN MCKINNEY and THOMAS EVANS,

the defendants, unlawfully, intentionally and knowingly  
did possess with intent to distribute, a Schedule II  
narcotic drug controlled substance, to wit, approximately  
39.08 grams of cocaine hydrochloride.

(Title 21, United States Code, Sections 812,  
841(a)(1) and 841(b)(1)(A).)

(Title 18, United States Code, Section 2.)

Thomas J. Defferman  
FOREMAN

W. D. North Seymour, Jr.  
WHITNEY NORTH SEYMOUR, Jr.  
United States Attorney

DOCKET ENTRIES

## D. C. Form No. 103 Rev.

73 CRIM. 135

9/29

9/29

9/29

73 Cr. 135

.2.

Motley, J.  
Ward, J.

## PROCEEDINGS

DATE / THOMAS EVANS

5-7-73 Filed Judgment (Atty. present) deft is sentenced to 2 YEARS as a YOUNG ADULT OFFENDER pursuant to Sec. 4010(a) of Ti. 18, U.S. Code, as extended by Sec. 4209 of Ti. 18 USC. Execution of prison sentence is suspended. Deft is placed on probation for a period of 3 YEARS, subject to the standing probation order of this Court. Count 1 is dismissed on motion of deft's counsel with the consent of the Govt. WARD, J. Entered 5-8-73-----

7-7-74 PETER EVANS ) Closed statistically because  
DEBORAH A. MCKINNEY ) (X) defendant is  
( ) co-defendant is  
( ) witness is  
In all other respects this case is still pending.

6-14-74 Filed following papers received from magistrate, docket sheet, complaint, disposition sheet and appointment of counsel.

1-31-75 Deft & atty. present (PETER EVANS) Pleads not guilty..10 days for motions, trial adj'd to April 21-75..Bail fixed in amt. of \$10,000 P.R.B. Unsecured..Deft remanded in lieu of bail.....Motley, J.

1-31-75 PETER EVANS - Filed personal recognizance bond in the sum of \$10,000 unsecured...

2-10-75 PETER EVANS - Filed affdvt. & notice of motion for a bill of particulars.....

2-13-75 PETER EVANS - Filed warrant of arrest with return..Warrant executed 1-31-75....

7-10-75 PETER EVANS - filed Government's notice of readiness for trial.

7-26-75 PETER EVANS - Conference held..Trial set for Aug. 6-75..Defts counsel application to be relieved is denied with leave to be renewed..Bail Cont d....Motley, J.

7-30-75 THOMAS EVANS - Filed Probation form No 25 and order that deft be unconditionally discharged from probation.....Ward, J.

7-30-75 THOMAS EVANS - Filed Probation form No 26 and order that conviction on May 4-73 has been set aside pursuant to Sec. 5021(b).....Ward, J.

Aug. 4-75 THOMAS EVANS - Filed transcript dated 3-3-73

Aug. 7-75 PETER EVANS - Conference held..Trial set for Aug. 14-75 at 2p.m.

Aug. 15-75 Filed Exhibits ordered sealed and placed in vault Rm. 602.....Motley, J.

8-1-75 PETER EVANS - Atty. present...JURY TRIAL begun...MOTLEY  
JACKSON, J.

8-15-75 Trial Cont'd.

8-18-75 Trial Cont'd.

8-19-75 Trial Cont'd. AND CONCLUDED...Deft GUILTY on each of Cts. 1 and 2..P.S.I. ordered..Sent. adj'd. to Sept. 22-75 at 10:30 A.M. Deft Remanded to time of Motley, J.

## PROCEEDINGS

|         |  |
|---------|--|
| 8-25-75 | PETER EVANS - Filed affdvt. & notice of motion for judgment of acquittal or for new trial.....   |
| 9-2-75  | PETER EVANS - Filed Govt's memorandum of law.  |
| 9-2-75  | PETER EVANS - Filed Govt's request for the voir dire.  |
| 9-2-75  | PETER EVANS - Filed Govt's requests to charge.   |
| 9-7-75  | PETER EVANS - Filed Govt's memorandum in support of its contention that defense counsel should be prohibited from cross examining T.Evans....  |
| 9-2-75  | PETER EVANS - Filed affdvt. of P.E.Virella, Jr. AUSA in response to pre-trial motions.   |
| 9-3-75  | THOMAS EVANS 1. Ed transcript of record of proceedings, dated 5/4/73   |
| 9-22-75 | PETER EVANS - Filed Judgment (Atty. William Gold, present) Deft sentenced to THREE YEARS on each of counts 1 and 2 to run concurrently with each other. Execution of sentence is suspended. Deft is placed on probation for a period of THREE YEARS on each of counts 1 and 2 to run concurrently with each other, subject to the standing probation order of this Court.....Motley, J....Ent. 9-23-75.... |
| 9-22-75 | PETER EVANS - Filed memo endorsed on motion filed 8-25-75***The foregoing motion for new trial is denied for the reasons set forth on the trial record***<br>Motley, J.....  |
| 9-22-75 | PETER EVANS - Filed notice of appeal from judgment of 9-22-75..Copy given to U.S. Atty's office and deft...  |

CHARGE TO JURY

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2 AFTERNOON SESSION

3 1:20 p.m.

4  
5 (In open court; jury present.)

6 THE CLERK: The Court is about to charge the jury.

7 If there is any spectator wishing to leave the courtroom,  
8 please do so now.

9 Marshal, please lock the door.

10 THE COURT: Before formally beginning the charge  
11 I would like to thank you for your cooperation in being  
12 prompt and the careful attention that you have given to the  
13 testimony and other evidence as it came in in this trial.  
14 Also before formally beginning the charge I would like  
15 to thank counsel on both sides of this case for their cooper-  
16 ation with the Court and to congratulate each of them on the  
17 high degree of professional skill which each has demonstrated  
18 throughout the trial.

19 I trust that you will bear with me now, ladies  
20 and gentlemen, and give me that same degree of attention  
21 which you have given throughout the trial so that you may  
22 carefully understand the legal principles which you are to  
23 apply to the facts in the case as you find them.

24 First of all, as you approach the performance of your  
25 function in this case, which is to determine the guilt or

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2 innocence of this defendant, please remember that it is your  
3 duty to weigh the evidence calmly and dispassionately without  
4 sympathy or prejudice for or against either the government  
5 or the defendant. You have to bear in mind that every  
6 defendant appearing before this Court is entitled to a fair  
7 and impartial trial regardless of his occupation or station  
8 in life.

9 The fact that the government is a party here,  
10 that the action is brought in the name of the United States  
11 of America entitles it to no greater consideration than  
12 that accorded to any other party to the litigation.

13 Now, by the same token, it is entitled to no  
14 less consideration and that is because, as you know, all  
15 parties stand equal before the law; that is the government  
16 and individuals alike.

17 Now, there are two charges in the indictment.  
18 We sometimes refer to them as counts. You must return a  
19 separate verdict as to each count as to this defendant  
20 and your verdict as to each count must be based solely on the  
21 testimony which you heard from the witnesses who took the  
22 witness stand here, the exhibits which were actually re-  
23 ceived into evidence and the stipulations which was  
24 entered into by the lawyers on both sides and on nothing  
25 else.

1        rgrbr 236

2                Your verdict as to each count must be unanimous  
3        and it must be either guilty or not guilty.

4                As the jurors you are the sole and exclusive  
5        judges of the facts in the case. That means that you pass  
6        upon the weight of the evidence. It means that you determine  
7        the **credibility** of the witnesses who testified here before  
8        you. It means that you resolve any conflicts that there may  
9        be in the evidence and finally it means that you draw such  
10       reasonable inferences as may be warranted by the testimony  
11       and other evidence in the case.

12               With respect to any matter of fact, I want to remind  
13        you again that it is your recollection and yours alone which  
14        governs. Anything which counsel for the government may have  
15        said or counsel for the defendant may have said or  
16        anything which I may have said is not to be substituted by you  
17        in lieu of your own recollection as to what the evidence  
18        shows in this case.

19               During the course of these instructions I may refer  
20        to some of the evidence. That doesn't mean that I think  
21        that's the most important evidence or the only evidence in  
22        the case. You have to consider all the evidence in this case  
23        in deciding whether the defendant is guilty or not guilty of  
24        a **particular** charge. You must consider all the testimony.  
25        That means the direct as well as the cross examination.

1       rgbr 237

2               As I have indicated, my function is to instruct  
3       you as to the law applicable to this case and you should  
4       accept the law as I state it to you in these instructions and  
5       apply the law to the facts as you find them. The logical  
6       result of that application is a verdict in the case with re-  
7       spect to each count, and as I have said you must return a  
8       verdict as to each count separately.

9               I want to caution you that you are not to single  
10       out any one instruction alone as stating the law, but you must  
11       consider these instructions as a whole.

12              You are not to assume that I have any opinion as to  
13       the guilt or innocence of this defendant or as to the  
14       truth or falsity of the charges. The fact that I have  
15       granted motions or denied motions during the course of the  
16       trial is not to be taken by you as any indication on my  
17       part that the Court believes the defendant to be guilty or  
18       not guilty, or that the charges are true or not true.

19              If during the course of the trial a question  
20       was asked?       and an objection was interposed and I sus-  
21       tained the objection, you are to disregard the question and  
22       any alleged facts contained in that question. Similarly,  
23       if I ruled that an answer be stricken from the record, you are  
24       to disregard both the question and the answer.

25              As you well know, the defendant on trial has

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2        entered a plea of not guilty to each charge made against  
3        him in the indictment and as I told you when the trial  
4        commenced, this means that the government, if the defendant  
5        is to be found guilty of any charge, has the burden of  
6        proving that the defendant is guilty of that charge beyond  
7        a reasonable doubt. As I told you this is a burden that  
8        never shifts. It remains upon the government throughout  
9        the entire trial. It remained with the defendant, or it was  
10       with him when the trial commenced, and this presumption  
11       of innocence will remain with him throughout this charge  
12       and even when you retire to the jury room to deliberate.

13                Now, the presumption of innocence is removed only  
14       if and when after your deliberations in the jury room you  
15       come to the conclusion that the government has sustained  
16       its burden of proof and that is to prove the defendant  
17       guilty beyond a reasonable doubt. As I told you before,  
18       in a criminal case a defendant does not have to prove his  
19       innocence. On the contrary, he is presumed innocent.

20                With respect to this burden on the government of  
21       proving the defendant guilty beyond a reasonable doubt,  
22       the question which naturally comes up is what is a reason-  
23       able doubt. The words almost define themselves. Reasonable  
24       doubt is a doubt founded in reason and arising out of the  
25       evidence in the case or the lack of evidence. It is a

1 rgr 239

2 doubt which a reasonable person has after carefully weigh-  
3 ing all the evidence, the kind of doubt which would make  
4 one hesitate to act. It means a doubt which is substantial  
5 and not merely shadowy. Reasonable doubt is one which appeals  
6 to your reason, your judgment, your common sense and your  
7 experience in life. It is not caprice, whim or speculation.  
8 It is not an excuse to avoid the performance of an unpleasant  
9 duty. It is not sympathy for a defendant.

10 Now, if after fair and impartial consideration of  
11 all the evidence you can candidly and honestly say that  
12 you are not satisfied of the guilt of this defendant and that  
13 you do not have an abiding conviction as to this defendant's  
14 guilt, such a conviction as you would be willing to act  
15 upon unhesitatingly in the important and weighty matters in  
16 the personal affairs of your own life, then you have a  
17 reasonable doubt and in that circumstance it is your duty  
18 to acquit the defendant.

19 On the other hand, if after such a fair and  
20 impartial consideration of all the evidence you can  
21 candidly and honestly say that you are satisfied of the  
22 guilt of this defendant, that you do have an abiding conviction  
23 as to this defendant's guilt, such a conviction as you would  
24 be willing to act upon unhesitatingly in important and  
25 weighty matters in the personal affairs of your own life,

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2       then you have no reasonable doubt and in that circumstance  
3       you may convict the defendant.

4               A reasonable doubt does not mean a positive  
5       certainty beyond all possible doubt. It is practically  
6       impossible for a person to be absolutely and completely  
7       convinced of any controverted fact which by its nature  
8       is not susceptible to mathematical certainty. In con-  
9       sequence, the law in a criminal case is that it is sufficient  
10      if the guilt of a defendant is established beyond a reason-  
11      able doubt, not beyond all possible doubt.

12             As jurors, as I have told you, you are the exclus-  
13      ive judges of the credibility or believability of the wit-  
14      nesses who testified here before you and you are the sole  
15      judges as to the weight to accord the testimony of any  
16      witness. You know, of course, that there is no automatic  
17      way to determine who is telling the truth and who is not.  
18      Credibility can be equated with believability and reliability.  
19      If a witness is credible you say he is believable and  
20      reliable. If he is incredible you say he is unbelievable.  
21      There is nothing mysterious about these words.

22             By what yardstick are you to judge the credibility  
23      of the witnesses. Each of you has given careful attention  
24      to the witnesses as they testified before you here on the wit-  
25      ness stand. You observed the witnesses. Issues of fact

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2 are presented for your determination and to a large extent  
3 the resolution of them depends upon the credibility which  
4 you accord the testimony of a witness and the support and  
5 lack of support that testimony received from other evidence  
6 in the case.

7 It is your duty to decide the disputed issues of fact.  
8 In doing so use your logic, your reason and your common  
9 sense and do not be side-tracked or diverted by what you  
10 consider to be a minor or insignificant detail or an  
11 irrelevancy, or by what you consider to be not an appeal to  
12 your reason or logic, but to mere sentimentality or  
13 unthinking passion. I repeat, use your common sense.  
14 You should carefully scrutinize all the testimony given, both  
15 directly and cross examination, the circumstances under which  
16 each witness has testified and every matter in evidence which  
17 tends to show whether a witness is worthy of belief.

18 Consider each witness' intelligence, motive and  
19 state of mind and demeanor and manner while on the witness  
20 stand. Consider the witness' ability to observe the  
21 matters as to which he has testified and whether he impresses  
22 you as having an accurate recollection of these matters.

23 Consider also any relation each witness may bear  
24 to either side of the case, and again the extent to which  
25 if at all each witness is either supported or contradicted

1       rgbr 242

2       by other evidence in the case.

3               Inconsistencies or discrepancies in the testimony  
4       of a witness or between the testimony of different witnesses  
5       may or may not cause a jury to disregard such testimony.  
6       Two or more persons witnessing an incident or a transaction  
7       may see or hear it differently and, of course, innocent  
8       misrecollection, like failure of recollection, is not an  
9       uncommon experience. In weighing the effect of a discrepancy  
10      always consider whether it pertains to a matter of importance  
11      or an unimportant detail and whether the discrepancy results  
12      in innocent error or intentional falsehood.

13             In determining credibility and weight to be given  
14      to the testimony of any witness you must always consider the  
15      testimony of the government's witnesses. The mere fact  
16      that they are employees of the government entitles them to  
17      no more and no less consideration than that accorded to any  
18      other witness. Nor should you be influenced by the number  
19      of witnesses called or the number of documents received in  
20      evidence. It is the quality of the testimony and other  
21      evidence which counts, not the quantity.

22             Now, after making your own judgment you  
23      will give the testimony of each witness such credibility,  
24      if any, as you think it deserves. If you find that any  
25      witness has wilfully testified falsely as to any material

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2     matter you may reject the entire testimony of that witness  
3     or you may accept such part or portions as commends itself  
4     to your belief which you find corroborated by other evidence  
5     and circumstances in the case.

6             Now, you realize, I am sure, that in the prosecution  
7     of a crime the government is frequently called upon to use  
8     persons as witnesses who actually participated in the crime  
9     charged. These persons are called accomplices. Often it has  
10    no choice. This is particularly so in the cases of joint  
11    ventures. Frequently it happens that only the members of  
12    the arrangement have evidence which is relevant to and  
13    important in a case. If accomplices could not be used there  
14    are many cases where there is real guilt and where convictions  
15    would not be otherwise obtainable.

16            During the course of the trial you heard the testimony  
17    of Thomas Evans, who testified concerning his involvement  
18    in the crimes charged. He is therefore an accomplice. Under  
19    the law, in order for one to be an accomplice he must have  
20    been involved in the commission of the crime or crimes with  
21    which a defendant is charged. He must be a participant in  
22    that crime or crimes. An accomplice does not become  
23    incompetent as a witness because of his participation in  
24    the criminal act charged. His testimony is not to be  
25    rejected unless you, the jury, think it has no weight

1 or it could not be believed at all. Like any other  
2 testimony it is to be considered and dealt with by the  
3 members of the jury. However, such evidence is properly  
4 considered with care and scrutiny, checked up with  
5 the other facts in the case and given appropriate weight.

6 The testimony of an accomplice alone, if believed  
7 by you, may be of sufficient weight to sustain a verdict  
8 of guilty even though it is not corroborated or supported  
9 by other evidence in the case.

10 Again you should keep in mind that the testimony of  
11 an accomplice is always to be received with caution and  
12 weighed with great care. You are instructed that in  
13 weighing the testimony of government witnesses who are  
14 charged as co-conspirators in this indictment you may take  
15 into account any motive which you think the witness may have  
16 in testifying for the government.

17 Mr. Thomas Evans has also pleaded guilty. These  
18 facts, that is that he is an accomplice and that he has  
19 already pleaded guilty, do not disqualify him as a witness,  
20 but these facts may well affect the weight which you accord  
21 to his testimony.

22 In the indictment, in addition to Thomas Evans,  
23 there is also another person named as a defendant, Deborah  
24 Ann Mc Kinney. However, she is not on trial before you.  
25 The only person on trial before you is the defendant Peter

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2 Evans. It is only his guilt or innocence which you are  
3 now called upon to decide, although, of course, in deciding  
4 his guilt or innocence you must consider whatever evidence  
5 there is as to the involvement of Miss Mc Kinney and Thomas  
6 Evans in the charges made against all three defendants.  
7 You are not to speculate during the course of your deliber-  
8 ations in the jury room as to why Miss Mc Kinney is not on  
9 trial. You must, however, as I have said consider  
10 testimony which is before you as to her role in the conspiracy  
11 alleged and as to her involvement, if any, in the second or  
12 substantive count.

13 Thomas Evans, as I have said, is also a defendant.  
14 He has pleaded guilty and has been sentenced. The fact  
15 that Thomas Evans has pleaded guilty, however, is not proof  
16 or evidence that the defendant on trial before you, Peter  
17 Evans, is also guilty. You must remember that guilt is personal  
18 and that the guilt or innocence of the defendant now on  
19 trial must be determined by you on the basis of the evidence  
20 adduced here at this trial before you which includes the  
21 testimony of all witnesses, the exhibits in evidence and  
22 the stipulations. The guilt of one person, therefore,  
23 is never to be predicated even in part on the guilt of  
24 someone else who has already pled guilty.

25 As I have told you, Thomas Evans, and as you know

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2 he has testified for the government and he is an accomplice,  
3 that is, a participant in the crime, his testimony there-  
4 fore is to be scrutinized with great care, but again the  
5 fact that he is an accomplice, as I previously told you,  
6 does not disqualify him as a witness.

7 You have heard testimony that in 1968 the  
8 defendant Peter Evans engaged in conversations with Thomas  
9 Evans in which Peter Evans admitted selling LSD tablets  
10 and at times going to California to obtain LSD tablets for  
11 the purpose of later selling those tablets in New York.  
12 Now, Peter Evans is not on trial before you for those  
13 alleged incidents. However, you may consider in determining  
14 whether Peter Evans acted in this case with guilty knowledge  
15 or intent, the fact, if you find it to be true, that Peter  
16 Evans engaged in other transactions in 1968 which are similar  
17 to those charged in the indictment. In other words, you con-  
18 sider such evidence only with respect to knowledge and in-  
19 tent, which is an element of each crime charged.

20 As I told you when you were being selected  
21 and before the trial commenced, an indictment is not  
22 proof or evidence. It is merely an accusation. It is a  
23 method or technique or procedure whereby one who is  
24 accused by a grand jury of a charge is brought into court and  
25 then their guilt or innocence is determined by a trial

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2 jury or a petty jury such as you are.

3 At this point I am going to read the indictment  
4 to you, each charge, and then I am going to tell you or  
5 enumerate for you the essential elements of each charge  
6 which you must find that the government has established  
7 beyond a reasonable doubt before you could find the defend-  
8 ant guilty of that particular charge.

9 The first count in the indictment charges the  
10 three defendants with having conspired to violate the  
11 federal narcotics laws. More specifically they are  
12 charged with conspiring to violate Title 21 United States  
13 Code, Section 812, 841 and 846.

14 Title 21, United States Code, Section 841 provides,  
15 in pertinent part, as follows:

16 "It shall be unlawful for any person knowingly  
17 and intentionally to possess with intent to distribute a  
18 controlled substance."

19 Now, Section 812 of that title defines "controlled  
20 substances" to include the narcotic drug cocaine.

21 Section 846 makes it a crime to conspire to violate  
22 Section 841, which I have just read to you.

23 In the first count of the indictment the defendants  
24 are charged with conspiring to violate Section 841, so I will  
25 read that first count to you now and then tell you the

1 rgrbr 248

2 essential elements of that charge, discuss them in greater  
3 detail, and as I have said you must find that the government  
4 has established each one of these elements beyond a reasonable  
5 doubt before you can find the defendant guilty. If you find  
6 that the government has failed to establish any one of  
7 those elements, then, of course, you must acquit the  
8 defendant. The first charge reads as follows:

9 "The grand jury charges:

10 "1. From on or about the first day of September  
11 1972, and continuously thereafter up to and including  
12 the date of the filing of this indictment, in the Southern  
13 District of New York, Peter Evans, Deborah Ann McKinney and  
14 Thomas Evans, the defendants, and others to the grand jury  
15 unknown, unlawfully, intentionally and knowingly combined,  
16 conspired, confederated and agreed to go and with each other  
17 to violate Sections 812, 841 of Title 21 United States Code.

18 "2. It was part of said conspiracy that the said  
19 defendants unlawfully, intentionally and knowingly would  
20 distribute and possess with intent to distribute Schedule 1  
21 and 2 narcotic drug controlled substances, the exact amounts  
22 thereof being to the grand jury unknown, in violation of  
23 Sections 812 and 841 of Title 21.

24 "Overt acts. In furtherance of said con-  
25 spiracy and to effect the objects thereof, the following overt

1 rgr 249

2 acts were committed in the Southern District of New York.

3 "1. On or about September 12, 1972 Peter  
4 Evans and Deborah Ann Mc Kinney entered Apartment 22 at  
5 17 St. Marks Place and met with Thomas Evans.

6 "2. On or about September 22, 1972 Deborah  
7 Ann Mc Kinney entered an automobile at 1st Avenue and 5th  
8 Street."

9 In order to convict the defendant on the conspiracy  
10 count, or on the second count, which I will come to, you must  
11 find beyond a reasonable doubt that he acted unlawfully,  
12 knowingly and wilfully, so I will define those terms for you  
13 now.

14 Unlawfully obviously means contrary to law.  
15 An act is done knowingly if it is done knowingly and  
16 purposefully and not because of mistake, accident, mere  
17 neglect or other innocent reason. An act is done  
18 wilfully if it is done knowingly, deliberately, intentionally  
19 and with an evil motive or purpose. In determining whether  
20 a defendant has acted wilfully it is not necessary for the  
21 government to establish that the defendant knew that he was  
22 breaking any particular law or any particular rule. It  
23 must, however, prove a bad purpose or motive on the part  
24 of a defendant. Knowledge and willfulness and intent of a  
25 defendant need not be proved by direct evidence. Like any

1        rgr 250

2        other fact in issue it may be established by circumstantial  
3        evidence.

4                There are two kinds of evidence recognized and ad-  
5        mitted in courts of justice, upon either of which you may find  
6        an accused guilty of a crime. One is called direct  
7        evidence and the other is called circumstantial evidence.  
8        Direct evidence tends to show the fact in issue without  
9        need for any other amplification, although, of course, there  
10       is always the question whether that evidence is to be be-  
11       lieved. Circumstantial evidence, on the other hand,  
12       tends to show other facts from which the fact in issue may  
13       reasonably be inferred. It is that evidence which tends to  
14       prove the fact in issue by proof of other facts which  
15       have a legitimate tendency to lead the mind to infer that  
16       the fact sort to be established is true.

17               In other words, circumstantial evidence consists  
18       of facts proved from which the jury may infer by a process  
19       of reasoning other facts in dispute. It is not necessary  
20       that the participation of a defendant be shown by direct  
21       evidence. The defendant's connection to a crime charged  
22       may be inferred from such facts and circumstances in  
23       evidence as would legitimately tend to support such an  
24       inference. Consequently knowledge and willfulness  
25       of an intent of a defendant need not be proved by direct

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2 evidence. Like any other fact in issue it may be established  
3 by circumstantial evidence.

4 In every criminal case it is necessary for the  
5 government to prove beyond a reasonable doubt that a defend-  
6 ant on trial had the necessary criminal knowledge, willful-  
7 ness and intent. Questions concerning a defendant's knowl-  
8 edge and willfulness and intent involve proof of a defend-  
9 ant's state of mind at the time of the alleged crime.

10 Now, it is obviously impossible to prove directly the opera-  
11 tion of a person's mind because you can not look into a  
12 person's mind and see what his or her intentions are or  
13 were, but the proof of the circumstances surrounding a  
14 defendant's activities may well supply an adequate and  
15 convincing basis for finding that a defendant acted  
16 knowingly, wilfully and intentionally. In other words,  
17 the actions of a defendant must be judged in their time and  
18 place just as the full meaning of a word is commonly  
19 understood only in relation to other words in the sentence  
20 or in its context. So the meaning of a particular act or  
21 conduct may depend upon the circumstances surrounding that  
22 act or conduct.

23 In determining the issue of knowledge, willfulness  
24 and intent you are entitled to consider any statements in  
25 evidence made by the defendant and any acts done by the accused

1 rgrbr 252

2 which are in evidence and all facts and circumstances in  
3 evidence which may aid you in determining the defendant's  
4 state of mind. You may consider such things as the age,  
5 background, occupation and experience of a defendant and  
6 whether such facts make it likely or unlikely, probable or  
7 improbable that a defendant fully and precisely understood  
8 what he was doing in regard to a transaction and were  
9 relevant in relation to others.

10 Now, what is a conspiracy? A conspiracy is a  
11 collective criminal agreement or a partnership in crime. A  
12 conspiracy presents a greater potential threat to government  
13 and society than acts committed by a lone wrongdoer.  
14 That is why the Congress has made conspiracy to violate  
15 a federal statute a separate and distinct crime. Con-  
16 certed action for criminal purposes often if not normally  
17 makes possible the attainment of ends more complex than those  
18 which an individual acting alone could accomplish. Moreover,  
19 group association increases the likelihood that the criminal  
20 objective will be successfully realized and renders detection  
21 more difficult than in the instance of a lone wrongdoer.  
22 AS I have said, it is because of these and other reasons  
23 that Congress has made conspiracy or concerted action to  
24 violate a federal law a separate and distinct crime and  
25 different from the substantive law which may be the objective

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2 of the conspiracy.

3 In order to prove the crime of conspiracy as  
4 alleged in the indictment the government must establish to  
5 your satisfaction beyond a reasonable doubt each of  
6 the four following elements of that crime: First, the  
7 existence of a conspiracy as alleged in the indictment;  
8 second, that it was a purpose of the conspiracy as alleged  
9 in the indictment to violate Title 21, United States Code,  
10 Section 841, which I read to you; third, that the defendant  
11 who is now on trial knowingly and wilfully became a partici-  
12 pant in or a member of the conspiracy; and, fourth, that at  
13 least one of the alleged co-conspirators knowingly committed  
14 at least one of the overt acts set forth in the indictment  
15 in furtherance of that conspiracy and during the period  
16 of the conspiracy as alleged.

17 Now, I want to discuss each of those four elements  
18 in greater detail. The first is **existence of** the conspiracy  
19 as alleged in the indictment. In order to establish a  
20 conspiracy the government is not required to show that two or  
21 more persons sat around a table and entered into a solemn  
22 pact, orally or in writing, stating that they have formed  
23 a conspiracy to violate the law, setting forth details of  
24 the plan, the means by which the unlawful project is to be  
25 carried out or the part to be played by each co-conspirator.

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Indeed, it would be extraordinary if there were such a formal agreement or specific oral statement. Your common sense will tell you that when men in fact undertake to enter into a criminal co-conspiracy, much is left to unexpressed understanding. Conspirators do not usually go around broadcasting their plans. They do not usually reduce them to writing or acknowledge them before a notary public. From its very nature a conspiracy is almost invariably secret in its origin and in its execution. Therefore, it is sufficient if you find that two or more persons in any manner or through any contrivance impliedly or tacitly came to an understanding to violate the law. In other words, express language or specific words are not required to indicate assent or attachment to a conspiracy, nor is it required to find that all the co-conspirators alleged in the indictment joined in the conspiracy in order to find that a conspiracy existed. You need only find that one alleged co-conspirator entered into an unlawful agreement with one or more persons in order to find the existence of a conspiracy.

In determining whether there has been an unlawful agreement you judge acts and conduct of the alleged co-conspirators which are done to carry out an apparent criminal purpose.

The old adage, actions speak louder than words,

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2 is applicable here. Usually the only evidence available of  
3 a conspiracy is that of disconnected acts, which, however,  
4 when taken together in connection with each other show a  
5 conspiracy to secure a particular result as satisfactorily  
6 and conclusively as more direct proof. Proof concerning  
7 the accomplishment of the objective of the conspiracy may  
8 be the most persuasive evidence of the existence of the con-  
9 spiracy itself. Success of the venture, if you believe it  
10 was successful, may be the best proof of the existence of  
11 an agreement.

12 In determining whether the conspiracy charged in  
13 this indictment actually existed you may consider the evidence  
14 and the acts in conduct of the alleged conspirators as a  
15 whole and the reasonable inferences to be drawn from such  
16 evidence. If upon such consideration of the evidence you  
17 find beyond a reasonable doubt that the minds of at least two  
18 of the alleged co-conspirators met in an understanding way  
19 and that they agreed as I have explained the conspiratorial  
20 agreement to you to work together in furtherance of the  
21 unlawful scheme alleged in the indictment, then proof of the  
22 existence of the conspiracy, but only of its existence is  
23 complete.

24 While the indictment charges that the conspiracy  
25 began on or about a certain date and continued to on or

1        rgr 256

2        about the date of the filing of the indictment, it is not  
3        essential that the government prove that the conspiracy  
4        started and ended on or about those specific dates. It is  
5        sufficient if you find that in fact a conspiracy was formed  
6        and existed for some substantial period of time within the  
7        period set forth in the indictment and that at least one  
8        of the overt acts was committed in furtherance of the  
9        conspiracy during that period.

10        An overt act which you find did occur need not  
11        have occurred on a specific date set forth in the indict-  
12        ment. You need only find that it occurred no earlier than  
13        September 1, 1972 and no later than February 5, 1973,  
14        which was the date of the filing of the indictment.

15        Now we come to the second element and that is the  
16        indictment charges that the conspiracy has as its objective  
17        the violation of the federal narcotics laws. More specifi-  
18        cally, the laws which I cited and read to you a moment  
19        ago. The government must prove this second element of the  
20        crime of conspiracy. That is, it must prove that it was  
21        a purpose of the conspiracy to violate these laws.

22        Now, with respect to the third element. The  
23        third element which you must find is that the defendant on  
24        trial knowingly and wilfully became a participant in or  
25        a member of the conspiracy. If you conclude that a con-

1 rgbr 257

2 spiracy as charged did exist and that its purpose was to  
3 violate the federal narcotics laws, as I indicated those laws,  
4 you must next determine whether the defendant here was a  
5 member of the conspiracy; that whether he participated in the  
6 conspiracy with knowledge of its unlawful purposes and in  
7 furtherance of its unlawful objectives. A defendant's  
8 participation in a conspiracy, like its existence, can be  
9 inferred from such facts and circumstances in evidence as would  
10 logically sustain that inference. I want to caution you,  
11 however, that mere association of one defendant with an alleged  
12 conspirator or conspirators does not establish his partici-  
13 pation in a conspiracy if you find that one did exist.  
14 So, too, mere knowledge by a defendant of a conspiracy or of  
15 any illegal act on the part of an alleged conspirator  
16 is not sufficient evidence to establish his membership  
17 in the conspiracy. You must find as I have said an actual  
18 knowing participation by defendant in an agreement to violate  
19 the law.

20 Again, an act is done knowingly if it is done  
21 voluntarily and purposefully and not because of mistake,  
22 accident, mere neglect or other innocent reason. An act  
23 is done wilfully if it is done knowingly, deliberately  
24 and with an evil purpose or motive.

25 Even if one conspirator joined the conspiracy after

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it was formed and was engaged in it to a degree more limited than that of other co-conspirators, he is equally culpable so long as he was a co-conspirator. In other words, it is not required that a person be a member of the conspiracy from its very start. He may join it at any point during its progress and be held responsible for all that has been done or said in furtherance of the conspiracy before he joined that may be done or said after he joined and during the **existence** of the conspiracy and in furtherance of the conspiracy. Simply stated, and using the partnership analogy, by becoming a partner he assumes all the liabilities of the partnership, including those which occurred before he became a member.

It is not required for the government to know that a conspirator knew all the other members of the conspiracy. A conspiracy once formed is presumed to have continued until its objective is accomplished or there is some affirmative act of determination by its members.

Once you are satisfied beyond a reasonable doubt that a conspiracy as alleged existed and that the defendant was a member of it, any acts and declarations of any persons whom you find were also members of the conspiracy made during its pendency and in furtherance of its objectives, are considered the acts and declarations of all other members,

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2 even though the particular defendant was not present at the  
3 time or did not know such statements were made or such acts  
4 were done by others in furtherance of the conspiracy.

5 In other words, every conspirator is fully responsible  
6 for what every other co-conspirator does in furtherance of the  
7 conspiracy whether he knows about it or not and whether he  
8 specifically approved it or not.

9 Now we come to the fourth and final element which  
10 you must find if you are to find the defendant guilty of the  
11 crime of conspiracy. The offense of conspiracy is complete  
12 only when the unlawful agreement is made and any single  
13 overt act to effect the object of the conspiracy is there-  
14 after committed by at least one of the co-conspirators.

15 An overt act is any step, action or conduct which is taken  
16 to achieve, accomplish or further the objective of the  
17 conspiracy. The purpose of requiring proof of an  
18 overt act is that while parties may conspire and agree  
19 to do an unlawful thing, they may change their minds or even  
20 abandon the project and do nothing to carry it into ef-  
21 fect, in which case it would not be an offense. The  
22 prosecution is not required to set forth in the indictment  
23 each and every act on which it relies to establish the con-  
24 spiracy or a defendant's participation therein, nor is it  
25 required to prove each overt act which may have occurred

1 rgrbr 260

2 during and in furtherance of the conspiracy, but it is  
3 required to prove that at least one overt act did take  
4 place here in the Southern District of New York, which  
5 includes Manhattan.

6 The overt act need not be criminal in itself. It may,  
7 for instance, as alleged in this case, consist of meetings  
8 between the defendant and co-conspirators. The overt act  
9 must be an act, however, that follows and comes towards the  
10 accomplishment of the plan or scheme charged in the conspiracy  
11 and must be knowingly done in furtherance of that conspiracy.

12 Now, I will read the two overt acts charged in  
13 the indictment. The first one is on or about September 12,  
14 1972 Peter Evans and Deborah Ann Mc Kinney entered  
15 Apartment 22 at 17 St. Marks Place and met with Thomas  
16 Evans.

17 Two, on or about September 22, 1972 Deborah Ann  
18 McKinney entered an automobile at 1st Avenue and 5th  
19 Street.

20 If you find that the government has failed to  
21 establish any one of the four elements which I have just  
22 enumerated and discussed for you beyond a reasonable  
23 doubt you must acquit the defendant; that is, you must  
24 find him not guilty of the charge of conspiracy. On the  
25 other hand, if you should find that the government

1 rgrbr 261

2 has sustained its burden or proving each of these elements  
3 beyond a reasonable doubt then you may convict the defendant  
4 of the crime of conspiracy.

5 Now we come to the second count in the indictment  
6 and that count reads as follows:

7 "The grand jury charges:

8 "On or about the 22nd day of September, 1972,  
9 in the Southern District of New York, Peter Evans, Deborah  
10 Ann Mc Kinney and Thomas Evans, the defendants, unlawfully,  
11 intentionally and knowingly did possess with intent to  
12 distribute a Schedule 2 narcotic drug controlled substance,  
13 to wit, approximately 39.08 grams of cocaine hydrochloride.  
14 Before you can find the defendant Peter Evans guilty of the  
15 charge made against him in Count 2, the substantive count,  
16 you must find that the government has established beyond  
17 a reasonable doubt each of the following three elements:  
18 First, that on or about September 22, 1972 Peter Evans  
19 possessed with intent to distribute a narcotic controlled  
20 substance; second, that on that occasion the defendant did  
21 so unlawfully, intentionally and knowingly; and, third, that  
22 the narcotic drug controlled substance was in fact cocaine  
23 hydrochloride. "

24 Now, I instruct you as a matter of law that  
25 cocaine hydrochloride is a narcotic drug controlled substance.

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2 However, you must still find beyond a reasonable doubt that the  
3 substance contained in Government's Exhibits 1 and 2 are  
4 in fact cocaine hydrochloride. In this connection you may  
5 consider the stipulation which the parties entered into to the  
6 effect that if the chemist had been called to testify as  
7 a witness he would have testified that the substance  
8 contained in Government's Exhibits 1 and 2 is cocaine.

9 With respect to this second count, the first element,  
10 which is that you must find that on or about September 22nd  
11 Peter Evans possessed with intent to distribute a narcotic  
12 controlled substance, I want to emphasize or focus for the  
13 moment on the meaning of the term possess with intent to  
14 distribute. Now, what do these terms mean? The phrase  
15 possess with intent to distribute means the following: The word  
16 possess as used here has its every day, common, ordinary  
17 usage; that is to have something within one's control  
18 either physically or constructively. Physical custody  
19 obviously meets this requirement. In addition one who does  
20 not have actual physical custody is said to possess  
21 something constructively if he exercises dominion or control  
22 over that object. Such control may be demonstrated by  
23 the existence of a working relationship between the person  
24 having such control and the person with actual physical  
25 custody, or the ability of such person to dictate the movement

1 rgbr263

2 or disposition of the object.

3 Again, the word intent refers to a person's state  
4 of mind. So the term possess with intent to distribute can  
5 be fairly stated to mean to control an object with the state  
6 of mind or purpose of transferring or delivering that item.

7 The second element I have already discussed for  
8 you and that is you must find that the defendant did so  
9 unlawfully, intentionally and knowingly.

10 The third element is that the narcotic controlled  
11 substance was cocaine hydrochloride and I have already  
12 discussed that.

13 With respect to each of these elements, if you  
14 find that the government has failed to establish any one of  
15 these three elements of the substantive count beyond a  
16 reasonable doubt you must acquit the defendant; that is you  
17 must find him not guilty. If, on the other hand, you find that  
18 the government has established each of these three elements  
19 beyond a reasonable doubt as to this defendant, then you may  
20 find this defendant guilty of the second count.

21 In the indictment, in addition to being charged  
22 in the second count with violating Title 21, United  
23 States Code, Section 841, which I read to you, the defendant  
24 is charged with violating Title 18, United States Code,  
25 Section 2, which is known as the aiding and abetting statute.

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2 That statute reads as follows:

3 "Whoever commits an offense against the United  
4 States or aids, abets, counsels, commands, induces or  
5 procures its commission is guilty of a crime. Whoever  
6 wilfully causes an act to be done which if directly performed  
7 by him or another would be an offense against the United  
8 States is also guilty of a crime."

9 Accordingly you may find the defendant Peter  
10 Evans guilty of the second charge in the indictment if you  
11 find beyond a reasonable doubt that another person actually  
12 committed the offense as charged and that this defendant  
13 aided and abetted the commission of that offense or that the  
14 defendant caused the crime to be committed by an innocent  
15 agent.

16 Now, there is no precise rule as to what acts  
17 a defendant must perform in order to constitute that  
18 defendant an aider and/or abettor. It is enough if you  
19 find that a defendant knowingly associated himself in some  
20 manner with an illegal venture, actually participated in  
21 it as something he wished to bring about or that he sought  
22 by his actions to make it succeed. In this connection you  
23 may consider whether the defendant had a stake in the  
24 venture. In other words, the law is that one who aids  
25 and abets another or causes another to commit an offense with

1 rgr 265

2 knowledge of the unlawful nature of the offense is just as  
3 guilty of that offense as if he committed the offense  
4 himself. To find a defendant guilty of aiding and abetting  
5 you must, of course, find something more than mere knowledge  
6 on his part that a crime was being committed. Thus,  
7 a mere spectator at a crime is not a participant or an aider  
8 and abettor. Consequently, in order to find a defendant  
9 guilty of aiding and abetting you must find that the  
10 defendant with knowledge of the unlawful purpose in some  
11 way associated himself with the illegal activity; that he  
12 knowingly participated in it as something he wished to  
13 bring about and that he knowingly by his actions endeavored  
14 to make it succeed.

15 Now, as I told you earlier the law does not compel  
16 a defendant in a criminal case to take the witness stand and to  
17 testify. Consequently, no presumption of guilt may be  
18 raised and no inference of any kind may be drawn from the  
19 failure of a defendant to take the stand and testify.  
20 As stated before, the law never imposes upon a defendant in a  
21 criminal case the burden or duty of calling any witnesses or  
22 producing any evidence.

23 The most important part of this case is the part which  
24 you as jurors are about to play because it is for you and you  
25 alone to decide whether a defendant is guilty as to each

1 rgr 266

2 count of the indictment. I know that you will try the issues  
3 that have been presented to you according to the oath  
4 which you have taken as jurors.

5 Now, in that oath you promised that you would well  
6 and truly try the issues joined in this case and a true  
7 verdict render. I suggest to you that if you follow that  
8 oath and try the issues without combining your thinking  
9 with any emotion, then you will arrive at a true and just  
10 verdict.

11 It must be clear to you that once you get into  
12 an emotional state and let fear or prejudice or bias or  
13 sympathy interfere with your thinking, then you will not  
14 arrive at a true and just verdict.

15 As you deliberate, ladies and gentlemen, please  
16 be careful to listen to the opinions of your fellow jurors and  
17 to ask for an opportunity to express your own views.  
18 Now, that's because no one juror holds the center of the  
19 stage in the jury room and no one juror may control or monopo-  
20 lize the deliberations.

21 If after listening to your fellow jurors and  
22 if after stating your own view you become convinced that  
23 your view is wrong, do not hesitate at any time because  
24 of stubbornness or pride of opinion to change your view.  
25 On the other hand, do not surrender your conscientious con-

1     rgbr 267

2     viction solely because of the opinion of your fellow jurors  
3     or because you are outnumbered.

4             Under your oath as jurors you are not to be  
5     swayed by sympathy. You are to be guided solely by the evi-  
6     dence in the case and the crucial hard core question which you  
7     must ask yourselves as you sift through this evidence is  
8     where do you find the truth. This is a quest for the  
9     truth. That's what a trial is. It is not a battle of  
10    wits. It is not a contest of salesmanship and it is not  
11    a contest of personalities. The only triumph in any  
12    case, whether it be civil or criminal, is whether or not the  
13    truth has triumphed. If it has then justice has been done.  
14    If not, justice will not have been done.

15            You are to determine the guilt or innocence  
16    of the defendant solely on the basis of the evidence and the  
17    law which I have just instructed you upon. The jury is not  
18    to consider or in any way to speculate about the punishment  
19    during its deliberations which a defendant may receive if  
20    he is found guilty. The function of a jury is to determine  
21    the guilt or innocence of a defendant on trial on the basis  
22    of the evidence and the Court's instructions as to the  
23    law. It is then for the Court or the Judge alone to  
24    determine what the sentence will be if there is a con-  
25    viction.

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2 As I have said, you must return a verdict of  
3 guilty or not guilty as to each count and your verdict as to  
4 each count must be unanimous and must reflect the conscientious  
5 convictions of each and every one of you.

6 When you go to the jury room to deliberate you may  
7 send for any exhibits you wish to see or have any of the  
8 testimony read back. You are instructed that you are not to  
9 reveal the standing of the jurors; that is the split of the  
10 vote if that should occur at any time to anyone, including  
11 the Court.

12 Now will counsel for both sides please come into the  
13 robing room.

14 (In the robing room.)

15 THE COURT: Mr. Virella, do you have any exceptions  
16 to the charge?

17 MR. VIRELLA: No exceptions, your Honor.

18 THE COURT: Do you have any exceptions to the  
19 charge, Mr. Gold?

20 MR. GOLD: Yes, ma'am. I would object to the  
21 charge on reasonable doubt. You jumped right into that  
22 from the presumption of innocence and apparently the jury could  
23 have been left with the feeling that the burden was on --  
24 there was a problem. You were talking about the presumption  
25 of innocence and that never leaves the defendant, it stays

1 rgr 269

2 with him, and then you jumped to the reasonable doubt and  
3 apparently a sentence had been left out. I think the  
4 jury could have gotten the idea that that was a burden on  
5 the defendant. I am not sure if the rest of your charge  
6 corrected that, I think the reporter might know what I am  
7 talking about.

8 THE COURT: What do you have in mind? I don't  
9 understand it.

10 MR. GOLD: The burden of proving everything  
11 beyond a reasonable doubt always stays with the people as to  
12 each and every element and the presumption of innocence, I  
13 think you have covered it, but it was just -- it seems as if  
14 you stopped in the middle of a sentence and then started  
15 in the middle of another sentence and wasn't obvious until you  
16 finished the other sentence that you were talking about  
17 reasonable doubt. You had gone from presumption of inno-  
18 cence to reasonable doubt. It doesn't ring a bell?

19 THE COURT: Let me see how it reads because I was  
20 reading it.

21 I don't say that. What I see before reasonable  
22 doubt is that they should consider all the evidence in the  
23 case and the fact that I refer to certain facts doesn't mean  
24 that I think that's the only evidence and the most important  
25 evidence. Then I went into reasonable doubt and after

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2 reasonable doubt I went into credibility, so I don't know  
3 what you are talking about.

4 MR. GOLD: I am talking of the jump from presumption  
5 of innocence to reasonable doubt.

6 THE COURT: There isn't any. I just told you  
7 what precedes reasonable doubt, my statement about my  
8 referring to certain facts, then reasonable doubt and then  
9 credibility, so I can't imagine what you have in mind.

10 Do you have anything else?

11 MR. GOLD: Yes. I would object to the entire  
12 charge with regard to accomplice testimony. Your Honor  
13 started out primarily almost as an apology for the  
14 government's position and the problems that the government  
15 faces in trying to prove a case like this and having to  
16 rely upon accomplice testimony. It almost went like a  
17 second summation. Of course, you did make some cautionary  
18 statements afterwards that it should be received with  
19 caution and care and you have to weigh the motive of the  
20 accomplice, you have to take into account the guilty  
21 pleas, but I think the initial portion --

22 THE COURT: The guilty plea?

23 MR. GOLD: Of a guilty plea by the accomplice had to  
24 be taken into account in assessing the value of an accomplice  
25 testimony, but the whole initial portion was almost an apology

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2 for the government's necessity to use an accomplice.

3 I think it was presented in a prejudicial way.

4 I would also object to your Honor telling the  
5 jury not to speculate with regard to Debbie and why she is  
6 not on trial, and yet at the same time the Court has ad-  
7 mitted into evidence the minutes of Judge Ward's sentencing  
8 which makes quite clear why Debbie is not on trial and  
9 I would, therefore, renew my original motion not to admit  
10 those minutes into evidence and we move to strike them and  
11 not make them available to the jury.

12 THE COURT: Incidentally, with respect to that,  
13 when we admitted that exhibit I think I asked where that was  
14 in the minutes, reference to Debbie being a fugitive.  
15 Is there?

16 MR. GOLD: I believe it is on page 4 and it was  
17 a statement by Mr. Mukasey, if I am not mistaken.

18 MR. VIRELLA: I believe there was a statement,  
19 your Honor, that the others would be apprehended, the  
20 others who had been involved.

21 THE COURT: Suppose we go over that before it goes  
22 in the jury room. Do you have anything else?

23 MR. GOLD: Yes, ma'am.

24 I would also object that just about that time your  
25 Honor was referring to Tommy as an accomplice. In other

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2 portions of the charge you referred to an alleged accomplice.  
3 You almost left the jury with the impression that you  
4 believe that Tommie was an accomplice; you assumed the state  
5 of facts but it is really for the jury to find.

6 I also at one point during the trial objected to the  
7 use of the term narcotic. When the indictment was read by your  
8 Honor you said narcotic substances. I respectfully submit  
9 that the indictment is not evidence in the case. It is a  
10 bootstrap kind of argument to say that obviously cocaine is  
11 a narcotic because the indictment says it is and at the  
12 same time to say that indictment is not evidence.

13 THE COURT: That wasn't before the jury. What  
14 I told the jury was that the law defined it as a a narcotic.

15 MR. GOLD: I think when your Honor read it to the  
16 jury it was referred to as a controlled substance. The  
17 only time when the term narcotic came up was when the Court  
18 read the indictment and I believe pharmacologically and  
19 legally cocaine is not a narcotic and the use of the term  
20 narcotic can only inflame and prejudice the jury.

21 I would also object to your whole approach to  
22 conspiracy. You started out by explaining the Congressional  
23 intent and necessity for having a conspiracy law. I think  
24 that can only be prejudicial to the defendants rights in this  
25 case.

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2 I also specifically renew my objection that was  
3 originally made to the government's request to charge in  
4 general, namely, that it was folkloric, simplistic and  
5 something such as sitting around the table kind of minimizes  
6 to my way of thinking the government's obligation as to what  
7 they have to prove in this case.

8 With regard to your discussion of Count 2, again  
9 that narcotic drug was taken up and I think that's pre-  
10 judicial there also.

11 The stipulation upon which the government is relying  
12 for a big portion of its case is only that it was cocaine.  
13 I don't think any chemist would have the guts or temerity to state  
14 that it is a narcotic. It is merely a controlled sub-  
15 stance.

16 I also object to the manner in which the words  
17 procures and causes were used in the description to the  
18 jury of what aiding and abetting can be. The words were pro-  
19 longed -- it doesn't show up in black and white which is why  
20 I am pointing it out verbally. It was stretched out.  
21 I am not sure intentionally, but it was suggestive to a  
22 jury.

23 THE COURT: What was suggestive?

24 MR. GOLD: The two words, a person who procures or  
25 causes. Compared to the rest of your Honor's speech pattern